Supreme Court, U.S.
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No. 04-1614

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH SCHWARTZ

Respondent,

v.

KAREN A. MURPHY AND
KATHLEEN A. MURPHY

Petitioners.

On Petition for a writ of Certiorari to the Supreme Court of Connecticut

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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INTRODUCTION

I. But for the factually unsupported, unconstitutional finding by the Connecticut courts that the Planning Board took the airspace above the Petitioners' residential shorefront property for the sole express purpose of improving the water view of the Respondent, a private party, this case would have been resolved long ago.

Numbered paragraph 2 of the June 14, 1978 letter (App. 100) from the City of Stamford's Planning Board states:

> 2) Lot 3 [the Petitioners' lot] on said "Staff Alternate Plan" shall be subject to the further restriction that no accessory structures or view obstructions be placed in the triangular area 50 x 95 x 110 ft. at its southeasterly corner.[1]

It is undeniable that the trial court in two separate paragraphs interpreted the above Planning Board condition, without any evidence, as follows:

> In granting this subdivision application, the Planning Board imposed a condition that a triangular area in the corner of what is now the defendants' property was subject to view easement (App. at 8, also see App. at 9 [2])

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[1] A copy of the map labeled "Staff Alternate Plan," which was part of Plaintiff's Exhibit 16, is in the Reply Appendix included herein. This Map is referenced in the Planning Board's June 14, 1978 letter and shows that the Planning Bard created and imposed the restriction in the northeast corner, and the restriction was imposed well before the Dunaway-Contegni Agreement was executed in 1981.

[2] The Appellate Court affirmed this factually unsupported, unconstitutional interpretation of the Planning Board's June 1978 letter. (App. at 21)

And then found, as affirmed by the Appellate Court (App. at 24, fn. 3) that:

> Additionally, if the view easement is not for the benefit of the plaintiff's property, it is difficult to discern the identity of any other beneficiary. (App. at 10)

II. The Appellate Court found, based on its "examination of the surrounding circumstances" that the government created and imposed the view easement in the northeast corner of the defendants' property, and that the "private agreement" relied on by the Respondent simply enabled him in particular to enforce it.

Specifically, the Connecticut courts found that:

> ...because the deed to the plaintiff did not refer to the view easement, the plaintiff is still able to enforce this restriction or condition [i.e., the Planning Board's condition to the subdivision] because both the defendants' predecessor in title, Dunaway, and the plaintiff's predecessor, Egbert, signed an agreement establishing this restriction on the defendants' use of their property. (App. 10)[3]

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[3] This finding would be unnecessary if the court was discussing the restriction in the private agreement. Further the Planning Board in granting the subdivision imposed conditions, and the conditions are incorporated into the Defendants' deed not by reference to the June 14, 1978 letter but by the Notations on the Maps, as reflected in restrictive covenants 5 and 6 in Defendants' deed. (App. 280)

The Appellate Court also specifically found:

> There is a discrepancy, however, between the text of the restrictive covenant in the deed [referring to restrictive covenant 6, not 7, in Defendants' deed (App. 280), which, consistent with the Planning Board's June 14, 1978 letter, locates the restriction in the southeast corner of Defendants' property] and the survey maps incorporated into the deed with respect to the exact location of the easement on the

Not only is the record is void of any facts explaining the unpled and unambiguous multi-party private agreement, the record below does not support a finding that the source of the court found view easement is other than the Planning Board. Further Respondent's briefs are replete with factual statements and arguments that the Planning Board was the source of the court found view easement. [4]

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defendants' property [which locate the restriction in the northeast corner of Defendants' property]. (App. 19) (See Pet. fn. 3, for additional analysis).

And then concluded:

Accordingly, we conclude that the correct location of the view easement on the defendants' property is depicted on map nos. 10716 and 12226, i.e., the triangular area [in the northeast corner of the Defendants' property] that abuts the portion of the plaintiff's property that is adjacent to Long Island Sound.

[4]For example said briefs state:

A review of the map dated April 25, 1978, entitled "Staff Alternate plan" and referred to in the Planning Board's conditional approval clearly prohibits sight restrictions in the southeasterly corner of Lot 3, the Lot now own by defendant in the instant manner. This restricted triangular area as shown on the "Staff Alternate Plan" map is clearly adjacent to the property currently owned by the plaintiff in the instant matter and, at the time, owned by George P. Egbert. The restrictions clearly were intended to benefit Mr. Egbert's property by protecting his view of the Long Island Sound. Indeed, at the hearing on the Deleo Brothers' application for the proposed subdivision, Mr. Egbert noted his objection to the proposed subdivision and stated that one of the reasons he purchased the property was the waterfront location. (internal cites omitted)(Trial Brief, page 4)

> Because of [Mr. Egbert's] comments and based on the neighbors objections, the Planning Board then approved the subdivision on the condition...the owners...were restricted from view obstruction in the southeasterly portion of what is now Lot 3. This is clearly noted on the map entitled "Staff Alternate Plan" that was referred to in the conditional approval of the Planning Board. (Trial Brief, page 9)
>
> The neighbors then appealed the Planning Board's [conditional] approval.... In consideration of the withdrawal of that appeal, Ms. Dunaway agreed to certain restrictions on her property, including the restrictions set forth in the Planning Board's decision. (Appellate Brief, page 13)
>
> In the instant matter, the Contegni Agreement refers to a view restriction in the southwesterly corner of the three acre property. However, the Agreement also cites the exact language (other than its reference to "southwesterly") and dimensions (50"x 95"x 110") of the view restriction set forth in the Staff Alternate Plan" map as found in the Planning Board's approval of the subdivision. (Trial Brief, page 8)
>
> At trial, plaintiff introduced evidence, including the both the deeds into defendants and their predecessors in title and the City of Stamford Planning Board file [note no reference to private agreement], which designated and described the view easement in the southeast corner of the property. (Appellate Brief, page 1, fn. 1)

Note also that (i) the Judgment File (App. 35) does not even refer to the multi-party private agreement, and (ii) according to the trial court's Memorandum of Decision (App. 30) issued in conjunction with the Judgment File, the dimensions of the easement are not the dimensions shown in the multi-party private agreement, but the dimensions shown on map 1226 (App. 31), a map that the Plaintiff's has no rights in or burdens of.

Note further that the Respondent now contends, without explanation, that the Judgment File is "clear and unambiguous." (Resp. Br. 3, para. E) In fact, the Respondent has acknowledged, as

The Petitioners' claims are properly before the Court and the petition should be granted.[5]

REASONS FOR GRANTING THE WRIT

I. If the Takings Clause applies to any type of case in the wake of *Kelo vs. City of New London, 545 U.S.___(2005)* it applies to this one – a taking by the Planning Board from citizen A to citizen B, with no stated public purpose.

The majority opinion in Kelo suggests if not promises that some takings will still not satisfy the "public use" test. Justice Kennedy states :

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any reasonable person would, that the Judgment File is ambiguous and that there are many unpled deed reformation issues that were left unresolved following the courts unconstitutional interpretation of the Planning Board's June 14, 1978 letter. (see Pet. 12 and fn. 8).

[5] As noted in the Petition, the Petitioners have continuously noted the illegality of the Connecticut court's finding a view easement on the basis of state action. Petitioners were further surprised by Respondent's appellate arguments supporting such finding, (see fn. 4 herein) In Petitioners' Reply to Respondent's Appellant Brief (which reply was dated and filed well before the Appellate Court's December 24, 2002 decision), Petitioners state that: "It is not plausible or legal that the Planning Board was concerned about Mr. Egbert's alleged Easement in approving that subdivision."

Note also that Petitioners have responded in this Reply to all of Respondent's assertions in its Brief in Opposition. Respondent, however, makes an unclear assertion of misstatement of facts in paragraph B on page 3 of its Brief. Petitioners have acknowledged that the Planning Board imposed a restriction in the northeast corner of their property. (see Pet. fn. 3). It is unclear what the Respondent is alleging in paragraph B on page 3 of its Brief.

> The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.

In the instant case because the lower courts found that the taking was intended to favor one particular private party- the Respondent- the taking does not comply with the U.S. Constitution or the law as set out on *Kelo.* Further the lower courts failed to articulated any public benefits and did not find that the taking was "rationally related to a conceivable public purpose."[6] The Connecticut courts' decision should not be allowed to stand because it incorrectly suggests that even the most egregious non-economic development takings are not subject to a presumption (rebuttable or otherwise) of invalidity and the courts need not review such takings under a standard of strict scrutiny.

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[6] Even if the lower courts' unstated finding was that the comprehensive plan of the Planning Board was to create an easement along the Long Island coast that would not be a valid regulatory action under the Taking Clause. *In Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987) Creating a view easement for a private party based on state action is not advancing a legitimate state interest.

II. The Court should clarify what standard of review applies to takings intended to favor a particular private party and who has the burden of proof .

This Court in *Kelo* did not foreclose the possibility that a more stringent standard of review than that announced in *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) of extreme judicial deference to governmental judgments, might be appropriate in certain taking cases. Petitioners asks this Court to articulate the standards that apply to the category of takings cases (i) that do not occur in the context of a comprehensive development plan, (ii) where the procedures employed are prone to abuse, (iii) where purported public benefits are so trivial or implausible, (iv) where the identity of the private beneficiaries are known, and (v) where there are accusations of impermissible favoritism to private parties.

In the instant case, notwithstanding the fact that the Petitioners made repeated accusations of impermissible favoritism (see fn. 5 herein), the courts applied a pre se constitutional validity standard of review and ignored available relevant evidence. The Connecticut courts made no attempt to comply with Justice Kennedy's instruction:

> A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose. (emphasis added) [7]

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[7] With respect to the record in the case at bar, the Respondent does

In most jurisdictions, as in the case at bar, the taking is presumed to be constitutional. Further it is incumbent upon the property owner to show that the taking was improper. This permissive attitude has encouraged governmental agencies and the courts to believe that property may be taken for pretty much any reason.

Imposing a strict constitutional level of scrutiny in the category of cases noted above and reversing the burden of proof by requiring the government to demonstrate a sufficient reason for its actions could strike a better balance between individual property owners and the perceived needs of the community. These are important questions of federal law that have not been, but should be, settled by this Court.

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not refute the known ex-parte communications noted in the Petition. (see Pet. fn 19), and cites to nothing in the record for his false assertion that: "Petitioners had an equal opportunity to provide a proposed order." (Resp. Br. 3, para. C). Further, Respondent fails to state in paragraph D, on page 3 of his Brief in Opposition, that the Petitioners, in an attempt to be heard on the ex-parte, unauthenticated admitted evidence, not only submitted a signed affidavit of Karen Murphy (App. 93) that incorporated a partially drafted affidavit for the director, which the director stated in an e-mail must be reviewed by legal counsel (App. 92), but also (i) requested that the court take judicial notice of the neighboring 1998 subdivision on the eastern border of Respondent's property (A73), and (ii) requested, as the trial court noted, that the case be reopened to admit the extrinsic evidence, or, alternatively, a "new trial" be held to analyze the extrinsic evidence (App. 33). Further the court declined to reopen the matter or to grant a new trial, not because of Respondent's newly found basis for objecting to the extrinsic evidence, but "because all issues were fully litigated" (App. 33), albeit without due process. (App. 186)

III. This Case presents the Court with a unique opportunity to address the hypothetical cases posited in *Kelo* and clarify and refine the limits on the government to take private property for private use, and how such limits should be enforced, following *Kelo*.

The majority in *Kelo* said that the "hypothetical cases posited by petitioners ['a one-to-one transfer of property, executed outside the confines of an integrated development plan'] can be confronted if and when they arise." As the case at bar demonstrates, the hypothetical posited in *Kelo* is no longer hypothetical, and presents this Court with the opportunity to confront a factually unsupported, unconstitutional taking. [8]

Finally, this Court indicated that the greatly expanded power of the government under the Takings Clause is not the power to destroy property rights, as was done in the case at bar, while this Court sits.[9]

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[8] Constitutional courts should use and not preserve their resources where, as in the case at bar demonstrates, the local government, to include the courts, is loaded against the property owner. The Respondent does not deny or refute the numerous unconstitutional equal protection and due process violations encountered by the Petitioners in this case. Incredulously, according to the Respondent due process is satisfied if (i) "[t]he Petitioners received a full trial hearing at the trial court level" – whatever that means, and (ii) "their appeals were heard and decided in a timely manner." (Resp. Br. at 2)

[9] Citing in fn. 18 *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218, 223 (1928) (Holmes, J., dissenting) ("The power to tax is not the power to destroy while this Court sits")